Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1231

ATLANTIC RICHFIELD COMPANY,

Petitioner

versus

CAROLYN HARRIS THIBODAUX, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

There was no formal opinion of the District Court. The minute entry of the District Court granting Summary Judgment in favor of Atlantic Richfield Company and against the plaintiff is reproduced in Appendix A, *infra*, p. A-1 of this Petition.

The opinion of the Court of Appeals for the Fifth Circuit is reported at and a copy is reproduced in Appendix B, *infra*, p. A-3 of this Petition

JURISDICTION

The Judgement (Appendix C, *infra*, p. A-20) and opinion (Appendix B, *infra*, p. A-3) of the Court of Appeals for the Fifth Circuit reversing the Trial Court's dismissal of respondents' claims against petitioner, was entered on September 22, 1978. A timely Petition for Rehearing was denied on November 8, 1978. Appendix D, *infra*, p. A-22) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

I.

Whether the Federal Maritime Remedy for wrongful death in inland waters extends to claims by heirs of a deceased employee against the decedent's employer.

STATUTES INVOLVED

L.S.A. RS 23:1032

L.S.A. RS 23:1061

L.S.A. RS 23:1032

The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal for said injury, or compensable sickness or disease. For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of is trade, business or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.

Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

The immunity from civil liability provided by this Section shall not extend to: 1) any officer, director, stockholder, partner or employee of such employer or principal who is not engaged at the time of the injury in the normal course

and scope of his employment; and 2) to the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this Section.

L.S.A. RS 23:1061

Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

AUTHORITIES

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO.

ATLANTIC RICHFIELD COMPANY
Petitioner

versus

CAROLYN HARRIS THIBODAUX, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Atlantic Richfield Company, respectfully prays that a writ of certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on September 22, 1978.

STATEMENT OF THE CASE

On June 10, 1974, Van Thibodaux was employed by H. B. Buster Hughes, Inc. (Buster Hughes) as a workman. Buster Hughes contracted with Atlantic Richfield Company (ARCO) to supply a crew to perform maintenance work on pipelines on an inland field. Thibodaux was part of the crew supplied by Buster Hughes. The field was accessible only through an inland canal in State waters. After launching the transporting vessel, a small "bateau", the crew boarded the boat and ARCO's direct employee, Hebert, took the helm. The skiff sank a short distance away in the inland canal and

Thibodaux drowned.

The widow of the deceased, individually and on behalf of her minor children, instituted an action against Hughes seeking recovery under the Jones Act, the General Maritime Law and the Longshoremen's and Harborworker's Compensation Act, 33 U.S.C. Section 901 et seq. An action was also filed against ARCO under the General Maritime Law and the Longshoremen's and Harborworker's Compensation Act.

The Trial Court granted Summary Judgment Motions in favor of Atlantic Richfield on the grounds that the decedent was not a seaman and that no Jones Act recovery could be allowed; that the decedent was not engaged in "maritime employment" within the meaning of 33 U.S.C. Section 902 (3) and hence no action existed under the Longshoremen's and Harborworker's Compensation Act; and finally, that Atlantic Richfield was a statutory employer of the decedent within the meaning of the Louisiana Revised Statute 23:1061 and as such, any liability on the part of Atlantic Richfield would be governed exclusively by the Louisiana Workmen's Compensation Act.

On appeal, the Fifth Circuit sustained the District Court's finding that the decedent had no recovery under the Jones Act. It also agreed with the District Court that the decedent's heirs had no action under the Longshoremen's and Harborworker's Compensation Act in that the decedent was not engaged in maritime employment. In so finding, the Court did not consider whether the decedent was a "borrowed employee" of ARCO.

However, the Fifth Circuit reversed the District Court's

finding that the sole liability of Atlantic Richfield to the decedent would be for workmen's compensation under the Louisiana Workmen's Compensation Act. The Court assumed for the purposes of that appeal, that Atlantic Richfield was a "principal" and that the decedent was its employee. Nonetheless, citing this Honorable Court's decision in *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed. 2d 339 (1970), the Fifth Circuit held that the Louisiana Workmen's Compensation Act, in particular, the exclusivity provisions thereof, could not deprive the plaintiffs of a remedy under *Moragne*. As defined by the Fifth Circuit, it was "presented with the issue of whether an exclusive remedy provision in a State Workmen's Compensation Statute can be operate to deprive a party of a cause of action afforded by Federal Maritime Law."

Petitioners respectfully aver that the question before the Fifth Circuit and this Honorable Court is one of first impresion. At no time has any Court of the United States addressed the question of whether Federal Maritime Law affords a remedy for wrongful death by an employee against his *employer*. It is respectfully s bmitted that there have been no decisions in the United States to the effect that Federal Maritime Law would allow a cause of action for death in State territorial waters against an individual's employer, who otherwise would be covered by State Workmen's Compensation Laws.

Petition for Rehearing was denied by the Fifth Circuit and Atlantic Richfield now seeks certiorari to review the important question of whether Federal Maritime Law provides a remedy for wrongful death in State territorial waters against a decedent's employer.

REASONS FOR GRANTING THE WRIT

I.

In the decision of *Moragne v. States Marine Lines,* this Honorable Court held that the widow of a longshoreman was entitled under the General Maritime Law of the United States to bring an action against an owner of a vessel for the death of a longshoreman caused by the alleged unseaworthiness of the vessel on navigable waters within a State. The rationale of Moragne was to assure vindication of Federal policies and to create uniformity in the field of admiralty law. The Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. § 761 et seq. provided for wrongful death remedy by the heirs of a decedent whenever the death occurred on the high seas beyond a marine league from the shore of any State. However, prior to *Moragne,* whether or not a wrongful death claim would exist for deaths on inland waters depended upon adjacent State Law. In other words, if the adjacent State allowed such a wrongful death action, one would exist and could be prosecuted in the Federal Court. If one did not exist under the adjacent State Law, it, in turn, could not be pursued in Federal Court.

Moragne did away with that concept and held, quite simply, that there would be a Federal Maritime Law action for wrongful death that was not dependent upon State Law. However, this Honorable Court, in *Moragne,* did not hold that the heirs of an employee could sue his employer for wrongful death when that employer would otherwise be statutorily immune from such a suit by way of a State Workmen's Compensation Law. This Honorable Court left open the question of whether the employer could have statutory

immunity from wrongful death suits brought by the heirs of their employees. It is respectfully submitted that the fact that State Workmen's Compensation Statutes may grant immunity from wrongful death to an employer, in no way runs contrary to the dictates of *Moragne*. At the very least, this issue has never been addressed by this Honorable Court and certiorari should be granted so the question may be properly raised and decided.

The lower Court, in its decision held that the exclusive remedy provisions of the Louisiana Workmen's Compensation Law conflicted with the wrongful death remedy provided in *Moragne*. However, as has been pointed out above, it is respectfully submitted that *Moragne* did not provide such a wrongful death remedy such as is advanced in this case. Nevertheless, petitioner submit that an exclusivity provision of Workmen's Compensation Act does not conflict with wrongful death remedies, assuming such a remedy exists. By way of analogy, *Moragne*, in its simplest terms, held that a decedent's heirs will have a wrongful death remedy not unlike Louisiana Revised Statute Article 2315, which allows tort claims in this State, including those for wrongful death. One cannot seriously argue that an employer's immunity in a tort suit "conflicts" with a general tort statute. Similarily, in *Moragne*, the general remedy was created as a matter of Federal law. The details surrounding that remedy, such as the elements of damages; who can be sued, or who cannot be sued, etc., have been left to the lower Courts for "further sifting."

Other Courts have recognized that they may look to State law in an effort to expand, limit or influence the new maritime wrongful death remedy sanction in *Moragne*. As was

stated in Petition of *Canal Barge Company, Inc.*, 480 F. 2d 11, 1973, A.M.C., 843 (5th Cir. 1973):

> The methodology for the single "further sifting" contemplated by *Moragne*, has thus been firmly established in the Fifth Circuit. In shaping the new remedy, we look first to existing maritime law to which *Moragne* has allowed access in a death action. We next examine the remedial policies indicated by Congress in the Federal Maritime Statutes. Heed to these statutes will assist in insuring that "uniform vindication of Federal policies" mandated by the *Moragne* Court.
>
> ....Finally, we look for "persuasive analogy" in the State Wrongful Death Acts. The importance of the role of these State Acts is accented by their long and successful contribution to the growth of Federal Maritime Law, and in their assistance in influencing the direction of admiralty law towards solution of contemporary maritime problems.... To the extent that policies developed under State death remedies are applicable in a maritime context, then, those policies should influence the context of the maritime death remedy.

As this Court correctly recognized, States are free to supplement established maritime law whenever the State laws will not flatly contradict the established maritime law. As has been noted in *Askew v. American Waterways Operators Inc.*, 411 U.S. 325, 93 S. Ct. 1590, 36 L.Ed.2d 280 (1973):

> While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the framers, it hardly follows from the constitutionality of that extension that we must sanctify the Federal Courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States.... Even though Congress has acted in the admiralty area, State regulation is permissable, absent a clear conflict with the Federal Law.

To afford an employer statutory immunity from wrongful death suits it cannot be said to conflict with the newly created wrongful death remedy any more than the State workmen's compensation statutes conflict with the general tort laws of a State. Employer immunity is merely an adjunct and supplement to the general law on liability. Furthermore, there can be no dispute that the State wrongful death statutes do not extend to suits against a decedent's employer.

This Court, in *Moragne*, implicitedly recognized the above principle in this footnote 11 to the *Moragne* decision. There, this Court noted:

> In 1927 Congress passed the Longshoremen's and Harborworker's Compensation Act, 44 Stat. 1424, 33 U.S.C. Section 901 et seq., granting the longshoremen the right to receive workmen's compensation benefits from their employers for accidental injury or death arising out of their employment. *These benefits are made exclusive of any other liability for employers who comply with the Act.* The Act does not, however, affect the long-

> shoremen's remedies against persons *other than his employer*, such as a ship owner, and therefore does not bear on the problem before us except perhaps to serve as yet another example of Congressional action to allow recovery for death and circumstances where recovery is allowed for non-fatal injuries.

Similary, the Louisiana Workmen's Compensation Act does not affect the worker's right to pursue a tort remedy against a third person, other than the employee's direct or statutory employer. There is no longer any dispute as to the applicability of the Louisiana State Workmen's Compensation Act to this case. In her same action against Atlantic Richfield Company, Mr. Thibodaux claimed against decedent's direct employer, Buster Hughes, and its carrier, Employers Mutual. But shortly prior to argument of the appeal before the Fifth Circuit, Mrs. Thibodaux settled all claims against Hughes and Employers Mutual for a total of $40,000.00 and, in a petition filed in the 32nd Judicial District Court for the Parish of Terrebonne, made the judicial declaration that she was now formally accepting compensation benefits under the Louisiana Workmen's Compensation Act. In a letter to the Assistant Deputy Commissioner of the U. S. Department of Labor, Mrs. Thibodaux withdrew her prior claim for Longshoremen's and Harborworker's Compensation Act benefits "for the reason that my husband's employment and death were covered by the Louisiana Workmen's Compensation Act, LSA-RS 23:1021, et seq and I acknowledge that my children and I are not entitled to any benefits therefore under the Longshoremen's and Harborworker's Compensation Act."

It is respectfully submitted that the lower Court's reliance

on the decision in *Roberts v. City of Plantation*, 555 F. 2d 750 (5th Cir. 1977) is inappropriate. In that case, the Court correctly found that a State Workmen's Compensation Act could not take preeminence over the *"Jones Act"*. In other words, the Federal pronouncement, allowing an individual to sue his employer would be supreme and the contrary provision of the State Compensation Act would have to give way. Obviously, in that case, there was a direct an irreconcilable conflict. The Jones Act *does* allow suits against employers whereas the State Workmen's Compensation Statute did *not*. Another such head-to-head conflict was addressed in *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed 43 (1953). In Pope, this Court refused to apply the Pennsylvania contributory negligence rule in a general maritime personal injury action. That rule would have barred all recovery in the case, whereas the general maritime principal of comparative negligence would not have. As has been noted above, the *Moragne* Court did not say that an individual could sue his *employer* under a maritime wrongful death action. It merely stated that an individual, who was a longshoreman, could sue a ship owner, not his employer, for wrongful death.

Obviously, there is no conflict with the general maritime law of wrongful death, and the Jones Act, and the Longshoremen and Harborworker's Compensation Act. Those Acts complement and supplement the new general maritime recovery. Nor do any irreconcilable conflicts exist in this case, and it is respectfully submitted that the Court of Appeal was erroneous in refusing to apply the statutory immunity granted to Atlantic Richfield under Louisiana Law.

Presumably, had the decedent survived with injuries, the

appellate Court's decision would have been different. The Court noted that its holding was based upon the fact that the death resulted and that *Moragne* granted a wrongful death remedy. In other words, had the decedent survived, one can only assume that the Court would have held his action barred by the exclusive remedy provisions of the State Workmen's Compensation Act. Such conflicting results would run completely contrary to the holding and intent of *Moragne*. This Court, in *Moragne*, specifically noted that its decision would be ridding the law of several anomalies, one of which was that some victums, prior to *Moragne*, of accidents in territorial waters could recover under the unseaworthiness doctrine if they were injured but not if they perished. One can only assume that if the Court of Appeal's holding in this case is undisturbed that recovery under the exact fachial circumstances can be had for death but not for injury. As such, the decision would not promote uniformity, but chaos in the admiralty law. It should be noted that if the plaintiff's decedent had survived the accident, he would obviously have had no cause of action against his own employer, save under the applicable compensation statute. Similarily, under the Death on the High Seas Act, supra, plaintiff's right of action is "against the vessel, person or corporation" which would have been liable if death had not ensued.

That this Court did not intend for *Moragne* to afford an additional remedy not sanctioned by DOHSA is best illustrated by principles announced in *Mobil Oil Company v. Higginbotham*, 98 S.Ct. 2010, 56 L.Ed. 2d 581.

The question of a maritime wrongful death remedy against a decedent's employer, is one of first impression. It is respectfully submitted that this Honorable Court should grant

certiorari not only because the issue is res nova but also because this Court's decision is *Moragne* specifically does not allow the avoidance of exclusivity provisions of an applicable State compensation statute. It is submitted that this case presents important questions under Federal Maritime Law and creates several anomalies and conflicts which only this Honorable Court can resolve by granting a writ of certiorari.

CONCLUSION

This Petition calls for clarification of important Federal maritime issues pertaining to wrongful death remedies against employers for deaths occurring in State territorial waters. Atlantic Richfield Company respectfully submits that certiorari should be granted.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon Joseph L. Waitz, P.O. Box 7015, Houma, Louisiana 70361 and James C. Murphy, Jr., 1320 First National Bank of Commerce Building, New Orleans, Louisiana, 70112, by placing same in the U.S. Mail, postage prepaid.

New Orleans, Louisiana, this 1st day of February, 1979.

W. K. CHRISTOVICH
WILLIAM J. SOMMERS, JR.

APPENDIX A

JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CAROLYN HARRIS THIBODAUX, Individually and as Administratrix of the Estate of the Minor Children, ORNELL THIBODAUX, CYNTHIA M. THIBODAUX, RON K. THIBODAUX and VAN THIBODAUX, III

CIVIL ACTION
NO. 75 - 620
SECTION "G"

versus

(Filed: 10/29/76)

ATLANTIC RICHFIELD COMPANY

J U D G M E N T

This cause having come on previously for hearing on the Motion for Summary Judgment of Atlantic Richfield Company for summary judgment in its behalf, following hearing on July 22, 1976, the matter was taken under submission. By Minute Entry of September 23, 1976, in considering the separate motions of the various parties, the Court granted the motion of Atlantic Richfield Company for summary judgment, which moved for dismissal of plaintiffs' claim. Pursuant to said Minute Entry, there being no just reason for delay, the Court now directs the entry of final judgment;

accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant Atlantic Richfield Company, dismissing the suit of Carolyn Harris Thibodaux, individually and as Administratrix of the Estate of the minor children, Ornell Thibodaux, Cynthia M. Thibodaux, Ron K. Thibodaux, and Van Thibodaux, III, at plaintiffs' cost.

DATED at New Orleans, Louisiana, this 29th day of October, 1976.

NELSON B. JONES, CLERK

BY: S/ Nelson B. Jones

APPROVED AS TO FORM

S/ Morey L. Sear
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY - NOV 3, 1976

APPENDIX B

OPINION OF CIRCUIT COURT OF APPEALS

Carolyn Harris THIBODAUX, Individually and as Administratrix of the Estate of the minor children, etc., Plaintiff-Appellant,

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellee.

No. 76-4216

United States Court of Appeals,
Fifth Circuit

Sept. 22, 1978.

After an oil field maintenance and construction workman drowned in a Louisiana canal as he was being transported to work, his widow instituted suit seeking recovery for his death under the Jones Act, general maritime law and the Longshoremen's and Harbor Workers' Compensation Act. The United States District Court for the Eastern District of Louisiana at New Orleans, Morey L. Sear, J., entered judgment against the widow, and she appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) the trial court acted properly in finding, as a matter of law, that the deceased failed to meet the maritime employment requirement of the LHWCA, and (2) that the trial court erred in holding that the exclusive remedy provision of the Louisiana Workmen's Compensation Act could undermind substantive rights af-

forded by federal maritime law.

Affirmed in part, reversed in part, and remanded.

1. Federal Civil Procedure 2497

Summary judgment denying recovery under Longshoremen's and Harbor Workers' Compensation Act for death of oil field maintenance and construction workmen was properly entered where record conclusively established that, when workman drowned in Louisiana canal, he was not amphibious worker protected by LHWCA since his work was performed on land, and was merely being transported to job site at time of death as he had been transported on numerous prior occasions. Longshoremen's and Harbor Workers' Compensation Act, §§2(3), 3(a), 4, 5, 33 U.S.C.A. §§902(3), 903(a), 904, 905; Fed. Rules Civ. Proc. rule 56(c), 28 U.S.C.A.

2. Courts 489(9½)
Workmen's Compensation 2084

Exclusive remedy provision in state workmen's compensation statute cannot operate to deprive party of cause of action afforded by federal maritime law; thus, district court erred in dismissing Jones Act suit for drowning death of oil field maintenance and construction worker in Louisiana canal on theory that defendant oil company was "principal" under Louisiana workmen's compensation statutes and that workers' survivors' exclusive remedy against it was therefore under Louisiana Workmen's Compensation Act. LSA-R.S. 23:1032, 23:1061, 23:1101; LSA-C.C. arts. 2097, 3536, Longshoremen's and Harbor Workers' Compensation Act, §5, 33 U.S.C.A. § 905.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, FA. and VANCE, Circuit Judges.

FAY, Circuit Judge:

This lawsuit arises from an unfortunate mishap which occurred on a Louisiana canal on June 10, 1974. On that day Van Thibodaux was employed as a workman by H. B. Buster Hughes, Inc. (Hughes), an oil field maintenance and construction company. Hughes contracted with Atlantic Richfield Company (ARCO)[1] to supply a four-man crew to perform maintenance work on piping and flow lines at the Bully Camp Field. Mr. Julius Hebert, ARCO's production foreman in Southeast Louisiana, requested Hughes to supply a crew of men, a vessel to transport the crew to the Bully Camp Field which was accessible only by water, and a pollution pan to be placed on a sunken barge[2] in the canal. The Hughes employees loaded the vessel[3] and equipment onto a truck and transported them to the canal, where they were offloaded. Despite the fact that the vessel had a capacity of only 900 pounds, the crew and equipment were placed aboard and, with Hebert at the controls, the vessel was launched. The vessel sank a short distance from the launching area and Van Thibodaux drowned.

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1. ARCO is a domestic oil corporation which engaged in oil exploration and the production engages in oil exploration and the production and refining of oil and related products.

2. The record reveals that the sunken barge served as a dock, or more precisely, as a tank battery platform.

3. Hughes owned the vessel in question.

Carolyn Thibodaux, widow of the deceased, individually and on behalf of her four minor children, instituted an action against Hughes and its insurer, Employers Mutual Liability Insurance Company of Wisconsin, seeking recovery under the Jones Act, general maritime law, and the Longshoremen's and Harbor Workmen's Compensation Act, 33 U.S.C. § §901, et seq. (hereinafter referred to as the LHWCA). An action was also filed against ARCO under the general maritime law and the LHWCA alleging that ARCO negligently caused the death of the deceased. These actions were later consolidated upon motion of the plaintiffs. The plaintiffs' motion to add various employees as additional defendants was denied. All parties moved for summary judgment, and, after conducting a hearing, the trial court granted the defendants' motions, holding that (1) the deceased was not a seaman and hence no Jones Act recovery could be had (2) the deceased was not engaged in "maritime employment" within the meaning of 33 U.S.C. § 902(3) and hence no action exists under the LHWCA and (3) because ARCO is a statutory employer of the deceased within the meaning of LSA-R.S. 23:1061 any liability of ARCO is exclusively governed by the Louisiana Workmen's Compensation Act.

During the pendency of this appeal, the plaintiffs settled their claims against Hughes and its insurer, Employers Mutual Liability Insurance Company of Wisconsin.[4] Therefore, the only issue remaining in this appeal is whether the court was correct in granting summary judgment in favor of the defendant ARCO. We have concluded that the trial court correct-

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4. The plaintiffs received $40,000 in settlement of all claims against "H. B. 'Buster' Hughes, Inc., its agents, employees, officers and insurers, including any and all insurers and particularly Employers Mutual Liability Insurance Company of Wisconsin. . ."

ly held that there is no genuine issue as to a material fact concerning the deceased's failure to meet the "maritime employment" requirement of the LHWCA. The LHWCA is therefore not applicable to this case. We further conclude, however, that the trial court erroneously held that any liability of ARCO is to be governed exclusively by the Louisiana Workmen's Compensation Act, and, accordingly, this case must be remanded for such further proceedings as may be necessary to resolve the rights and liabilities of the parties under general maritime law.

1. LHWCA

[1] As we have stated, the plaintiffs settled their claim for any compensation benefits under the LHWCA with Hughes, the employer of the deceased, prior to the time that this case was orally heard. Since the compensation liability of a contracting employer for injury or death sustained by an employee of a subcontractor pursuant to 33 U.S.C. § 904 is secondary only, *Probst v. Southern Stevedoring Co.*, 379 F. 2d 763 (5th Cir. 1967), it would appear at first blush that the settlement agreement takes the issue of the applicability of the LHWCA out of this case. This conclusion does not follow. If the LHWCA is applicable to this case, and if it is determined that the deceased was a "borrowed employee" or "borrowed servant" of ARCO, the plaintiffs exclusive remedy against ARCO will lie in the recovery of compensation benefits under the Act. *See, Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977). If that be the case, we need not consider whether the exclusive remedy provision of the Louisiana Workmen's Compensation Act prevents the plaintiffs from pursuing a general maritime action for wrongful death.

An employee now falls within the ambit of the LHWCA only if he can satisfy the dual tests of "situs" and "status" set forth in the Act. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). The relevant provisions of the Act provide as follows:

> Compensation shall be payable. . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States . .. 33 U.S.C. § 903(a).
>
> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload any small vessel under eighteen tons net. 33 U.S.C. §902(3).

There is no dispute that the situs test is satisfied in that the deceased met his death upon navigable waters.[5] The sole question, therefore, with respect to the applicability of the Act is whether there is a genuine issue of material fact concerning the status of the deceased at the time of his death. In other words, is there a genuine issue of material fact as to whether the deceased was engaged in "maritime employment" within the meaning of the Act when the vessel sank? We must look to *Caputo*, *supra*, for guidance. In that case, compensation awards to respondents Blundo and Caputo had

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5. The parties do not dispute that the canal in which the deceased met his death was indeed "navigable" within the meaning of the statute.

been affirmed by the Court of Appeals. Blundo, a "checker", was responsible for checking and marking cargo being unloaded from a vessel or from containers taken from the vessel. While marking cargo from a container, he slipped on the icy pier and was injured. Caputo was a member of a regular stevedoring "gang" for another company but was temporarily hired by Northeast Marine Terminal Company to load and unload containers, barges, and trucks at the pier. He was injured while loading ship's cargo into a truck. The Court in *Caputo* recounted the history of both the LHWCA and the 1972 amendments thereto, and we will therefore not repeat what is said there in detail. After noting that neither the text of the Act nor its legislative history defines the phrase, "maritime employment", the Court concluded that both Blundo and Caputo satisfied the "status" test of eligibility for LHWCA compensation, seemingly applying a separate test to each.

The Court reasoned that in extending coverage shoreward in the 1972 amendments, Congress intended to provide coverage for those involved in modern cargo handling techniques, such as the unloading of a container. Blundo met the status requirement because at the time of the injury his activities were "clearly an integral part of the unloading process. . ." 432 U.S. at 271, 97 S.Ct. at 2361. Therefore, Blundo's activity at the time of injury qualified him for LHWCA benefits. As to the claimant Caputo the Court recognized that the Congressional goal of adapting the Act to accommodate modern cargo handling techniques was irrelevant because Caputo was injured while loading cargo into a truck on the pier. *Id.* at 271-272, 97 S.Ct. 2348. However, the Court discerned a distinct Congressional objective which supports the status of Caputo as a covered em-

ployee. The Court Stated:

> The Act focuses primarily on occupations - longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 amendments, would be covered for only part of their activity. It seems clear therefore, that when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 amendments, would be covered for only part of their activity.

Id. at 273, 97 S.Ct. at 2362. Therefore, the Court recognized occupation as an alternative test to support status as a maritime employee. [6]

With the alternative tests of occupation and activity at the time of injury in focus, we now proceed to determine whether the district court properly granted summary judgment on the issue of status in the case at bar. At the outset we recognize that summary judgment is indeed a "lethal weapon" [7] and is not to be used as a means to deprive a litigant of his right to trial by jury. *Whitaker v. Coleman*, 115 F.2d 305 (5th Cir. 1940). Summary judgment is proper

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6. For an excellent discussion of the tests of status fashioned by the Supreme Court in *Caputo, see, Longshoremen, Longshoring Operations, and Maritime Employment: A Dual Test of Status After Northeast Marine Terminal Co. v. Caputo*, 64 Va.L.Rev. 99 (1978).

7. *Brunswick v. Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967)

only when there is no genuine issue as to a material fact and the movant is entitled to a judgment as a matter of law. Fed. R.Civ.P. 56(c); *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860 (5th Cir. 1975). The Court should liberally construe all pleadings in favor of the party against whom the motion is made, *Dassinger v. South Central Bell Telephone Co.*, 505 F.2d 672 (5th Cir. 1974), and the motion should be granted only when there is no substantial evidence in support of the non-movant's position, or when "the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that *conceding its truth, it is without legal probative force. . . .*" Whitaker, *supra*, at 306. (emphasis added).

The plaintiffs contend that there is ample evidence in the record to withstand summary judgment on the "maritime employment" issue.[8] The plaintiffs argue that the record reveals that the deceased was transported by vessel to his work locations approximately 80% of the time, that the vessel was offloaded from a truck into the canal with the assistance of the deceased, that the deceased loaded equipment into the vessel, and that a pollution pan was to be installed on a sunk-

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8. The plaintiffs have not addressed the "borrowed servant" issue as it may relate to the exclusive remedy provision of the LHWCA. 33 U.S.C. §905(a). The plaintiffs' preoccupation with establishing coverage under the Act has perhaps obscured the impact of such coverage upon their right to pursue a third party action against ARCO, should ARCO in fact be determined to be a "borrowing employer." Because we have concluded that the exclusive remedy provision of the Louisiana Workmen's Compensation Act does not prevent the plaintiffs from pursuing their general maritime claim for wrongful death, it would obviously be to the plaintiffs advantage to now change hats and contend that the LHWCA is inapplicable to this case. ARCO asserts that the Act does not apply, but, alternatively, if it does apply, coverage under the Act provides the exclusive remedy in the case at bar. ARCO would probably also prefer to change course at this time and argue in the first instance that the Act does apply.

en barge.[9] ARCO contends that aside from the momentary placement of the pollution pan on the sunken barge, the only connection of the deceased with maritime activity was the necessity of traveling upon navigable waters to reach the Bully Camp Field, where the crew's maintenance work was to be performed.

The record is abundantly clear that even if the facts as stated by the plaintiffs are true, as a matter of law the deceased was not engaged in "maritime employment" as measured by the alternative tests of status sanctioned in *Caputo*. There is no substantial evidence that the deceased spent at least part of his time "indisputably" [10] as a longshoreman, harbor worker, ship repairman, shipbuilder, or shipbreaker. The record overwhelmingly establishes that the occupation of the deceased was that of an oilfield construction and maintenance man. The deceased simply is not the amphibious worker sought to be protected by the 1972 amendments to the LHWCA because his work was performed on land. The locality of the work sites fortuitously rendered it necessary to travel over water.

Secondly, the status requirement can not be satisfied in this case by looking to the activity in which the deceased was

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9. There is much dispute in the record concerning the significance of the intended "installation" of the pollution pan on the sunken barge. Julius Hebert, ARCO's production foreman, testified that such installation merely involved placing the pan aboard the barge and would take only minutes to complete. This testimony was uncontradicted. The plaintiffs contend that such intended installation necessarily involved the deceased in "maritime employment" within the meaning of the Act. For purposes of this appeal we assume that the parties did in fact intend to "install" the pollution pan on the barge.

10 Caputo *supra* 432 U S at 273 97 S.Ct 2348

engaged at the time of death. Van Thibodaux was not actually involved in the loading, unloading, repairing, shipbuilding or shipbreaking process, or an integral part thereof, at the time that he unfortunately met his death. We again emphasize that the uncontradicted facts indicate that the deceased was merely being transported to a job site at the time of death, as he had been transported on numerous prior occasions. The deceased was not loading or unloading the vessel when it sank and the mere fact that on this one isolated occasion the vessel was to stop and a pollution pan was to be placed on a sunken barge does not operate to automatically convert the deceased into a maritime employee covered by the Act. The record does not dispute that placing the pan on the sunken barge was to be no more than a momentary and incidental diversion from the ultimate purpose to be served by the work crew boarding the vessel -- transportation to the Bully Camp Field. Furthermore, there is no evidence in the record to indicate that the deceased was to participate in any way in the installation of the pollution pan. Because no conflicting inferences can be drawn under these circumstances, it can be held as a matter of law that the deceased was not engaged at the time of his death in an activity Congress sought to include with in the ambit of the Act. Accordingly, the district court correctly granted summary judgment denying application of the LHWCA to this case.[11]

2. The Louisiana Act and General Maritime Law

[2] The Louisiana Workmen's Compensation Act provides that any person (referred to as a "principal") who contracts

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11. We therefore need not consider whether the deceased was a "borrowed employee" of ARCO.

out work which is a part of his "trade, business, or occupation" is liable for the payment of compensation to any of the contractor's employees who are injured while engaged in such work to the same extent as if the injured employee was an employee of the principal. LSA--R.S. 23:1061. The purpose of this section is to prevent the employer from avoiding compensation liability by contracting out all or part of his work. *Cole v. Chevron Chemical Co.*, 477 F.2d 361 (5th Cir. 1973). The trial court held that ARCO was a "principal" within the meaning of the Act, and, accordingly, the plaintiffs' exclusive remedy against ARCO is under the Louisiana Workmen's Compensation Act. LSA--R.S. 23:1032. [12]

In *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the Supreme Court held that federal maritime law affords a remedy for wrongful death occasioned in state territorial waters.[13] In the case at bar ARCO seeks to utilize Louisiana law to deprive the plaintiffs of a remedy under *Moragne*.[14] We are therefore squarely present-

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12. In the briefs and in oral argument the plaintiffs and ARCO met head on as to the issue of whether ARCO was a "principal" under the facts of this case. The parties part company as to the proper test to be applied. At the outset, we point out that we have recently certified the question of what test is to be applied in determining status as a "principal" to the final arbiter of Louisiana law - the Louisiana Supreme Court. *Blanchard v. Engine and Gas Compressor Services, Inc.*, 5 Cir., 575 F.2d at 1140. For purposes of this appeal, however, we willl assume, without deciding, that the trial court was correct in classifying ARCO as a "principal" within the meaning of the Louisiana Workmen's Compensation Act.

13. *Accord, Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974).

14. ARCO does not seriously dispute that the plaintiff has properly invoked the admiralty and maritime jurisdiction of the district court. Were this issue contested, we would conclude that the plaintiffs have

ed with the issue of whether an exclusive remedy provision in a state workmen's compensation statute can operate to deprive a party of a cause of action afforded by federal maritime law.

We were presented with an analogous situation in *Roberts v. City of Plantation*, 558 F.2d 750 (5th Cir. 1977). In *Roberts* the plaintiff sought recovery under the Jones Act and general maritime law even though state proceedings under the Florida Workmen's Compensation Act had been commenced. We succinctly held that "[i]f plaintiff can prove himself entitled to Jones Act recovery, the exclusive remedy provisions of Florida's workmen's compensation statutes cannot oust the federal court of its jurisdiction." *Id.* at 751. Our holding in *Roberts* was entirely consistent with the holding of the Supreme Court in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953). In *Pope* the court refused to apply the Pennsylvania

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(Footnote 14 - continued)
a cause of action within admiralty jurisdiction when applying the factors explicated in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973). In *Kelly*, we recognized that locality alone is insufficient for invocation of admiralty jurisdiction. We held that in addition to satisfying the locality test, the facts and circumstances of the claim must bear a significant relationship to traditional maritime activity. In determining whether such a significant maritime relationship exists, we held that the court should consider the following: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and type of injury; and traditional concepts of the role of admiralty law. 485 F.2d at 525. We noted that "Admiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters." *Id.* at 526.

It is important to distinguish between the relationship to traditional maritime activity required for the invocation of admiralty jurisdiction, see *Kelly, supra*, and the threshold requirement of *maritime employment* necessary to establish coverage under the LHWCA. The facts of this case satisfy the former but not the latter.

contributory negligence rule which would have barred all recovery in the plaintiff's general maritime personal injury action. The court stated that "[w]hile states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them." *Id.*, 346 U.S.at 409-410, 74 S.Ct. at 205. (footnote and citations omitted).

The holding in *Pope* was constitutionally mandated. The Constitution provides that the Judicial Power shall extend "to all cases of admiralty and maritime jurisdiction." This constitutional grant of jurisdiction has been construed to mean that general maritime law is to be placed under national control in " 'its substantive as well as its procedural features. . . .' " Pope, *supra*, at 409, 74 S.Ct. at 205.[15] We are mindful that there is room for state action in the regulation of maritime commerce, *see, Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973), and that state created rights may be enforced in a court of admiralty. *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, 79 S.Ct 468, 3 L.Ed.2d 368 (1959). It is settled, however, that state law must yield to the needs of a uniform federal maritime system when inroads by the state cause disharmony. *Id.*

The foregoing authorities make it clear that an exclusive remedy provision in a state workmen's compensation law cannot be applied when it will conflict with maritime policy

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15. *See Bagrowski v. American Export Isbrandtsen Lines, Inc.*, 440 F.2d 502 (7th Cir. 1971), where the Court held that the exclusive remedy provision of the Wisconsin Workmen's Compensation Act could not deprive a party of the right to indemnification under federal maritime law.

and undermine substantive rights afforded by federal maritime law. Were we to hold otherwise in this case, we would permit the State of Louisiana to erode the uniformity in federal maritime wrongful death actions spawned by *Moragne*. In creating a federal maritime action for wrongful death, the Court in *Moragne* stressed the need for uniformity. The Court stated:

> Our recognition of a right to recover for wrongful death under general maritime law will assure vindicstion of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. . . Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country' (citations omitted).

398 at 401-402, 90 S.Ct. at 1788. *Moragne* dictates that "[t]here is now a cause of action for wrongful death in admiralty that is not dependent on adjacent state law." *Hornsby v. Fish Meal Co.*, 431 F.2d 865, 867 (5th Cir. 1970). Our holding is limited. We deal only with the exclusive remedy provision of the Louisiana Workmen's Compensation Act as it may affect a remedy afforded by federal maritime law.

ARCO contends that if we permit the plaintiffs to proceed under general maritime tort law we will necessarily afford greater rights than would be afforded under state law merely because the deceased met his death upon navigable waters.

We cannot agree. The plaintiffs are permitted to go forward with their lawsuit not merely because the deceased was killed upon navigable waters, but because the facts surrounding the occurrence display a sufficient relationship to traditional maritime activity, and because the Supreme Court in *Moragne* saw fit to provide a federal maritime remedy for wrongful death occurring upon state territorial waters regardless of the rights which might be afforded to the plaintiff under state law.

In conclusion, although the trial judge correctly determined that the LHWCA is not applicable to this case, he erroneously concluded that the Louisiana Workmen's Compensation Act provides the plaintiffs' exclusive remedy. Therefore we hereby reverse the entry of summary judgment in favor of ARCO and remand this case for such further proceedings as may be necessary to determine the rights and liabilities of the parties. On remand, the plaintiffs are entitled to pursue their general maritime claim against ARCO for wrongful death.[16] We intimate no opinion as to the merits of

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16. On remand, the plaintiffs are not entitled to proceed under the theory of unseaworthiness. First, ARCO did not own the vessel. Second, we have determined that the deceased was not a maritime employee entitled to the warranty of seaworthiness, but even if we had decided that the plaintiff was entitled to coverage under the LHWCA, he could not proceed under an unseaworthiness theory as a *Sieracki* seaman. *See, Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). The 1972 amendment of 33 U.S.C. § 905 eliminated the action of the covered employee based upon unseaworthiness. *Hess v. Upper Mississippi Towing Corp.,* 559 F.2d 1030, 1032 (5th Cir. 1977). Nor was the deceased a "seaman" within the traditional sense. There is insufficient evidence in the record to create a genuine issue of material fact in support of the deceased's status as a seaman. The record clearly indicates that the deceased was not permanently assigned to a vessel nor did he perform a substantial part of his work on a vessel. *See Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959).

this claim. The trial court, of course, retains jurisdiction of the third-party indemnity claim filed by ARCO against Hughes.[17]

Affirmed in part, reversed in part, and remanded.

(Footnote 16 - continued)
We do understand the plaintiffs to allege, however, that they may proceed against ARCO because its employee Hebert negligently operated the vessel and/or negligently caused to be loaded onto the vessel an excessive amount of weight, causing the vessel to sink.

17. It is also necessary to comment upon one additional matter raised on appeal. During the course of proceedings below, and over two years after the incident in question, the plaintiffs sought to amend the complaint to add as additional defendants Julius Hebert, an ARCO employee, and Joseph Boudreaux, a Hughes employee, allegedly liable as "executive officers" under Louisiana law. The Louisiana Workmen's Compensation Act permitted such an action to be maintained at the time suit was instituted in this case.

LSA--R.S. 23:1101. The plaintiffs contend that this alternative cause of action should be considered only in the event that the Louisiana Workmen's Compensation Act is determined to be their exclusive remedy. The trial court refused to permit such amendment, apparently basing its ruling upon the conclusion that the amendment was barred by the one year prescriptive period applicable to tort actions in Louisiana. La.C.C. art. 3536.

The settlement agreement entered into between the plaintiffs and Hughes effectively absolved Boudreaux of any liability to the plaintiffs. We have determined that the plaintiffs may proceed under the general maritime law against ARCO, and, because the plaintiffs have all but conceded that they do not wish to pursue the individual claim under state law if a general maritime claim is available, we decline to rule on the propriety of the district court's refusal to permit the amendment. In any event, it appears that the plaintiffs' contention that the filing of suit against ARCO interrupted the prescriptive period as to Hebert is belied by the holding of the Louisiana Supreme Court in *Cox v. Shreveport Packing Co.*, 213 La. 53, 34 So.2d 373 (1948). In *Cox* the Court held that the filing of suit against an employee did not prevent the running of the prescriptive period as to the employer. The Court held that the employee and employer were not solidary obligors within the ambit of La.C.C. art. 2097 which provides that "A suit brought against one of the debtors in solido interrupts prescription with regard to all."

APPENDIX C

JUDGMENT OF COURT OF APPEALS

UNITED STASTS COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED: Nov. 17, 1978

NO. 76-4216

D.C. Docket No. 75-620

CAROLYN HARRIS THIBODAUX, Individually and as Administratrix of the Estate of the Minor Children, ETC.,
Plaintiff-Appellant,

versus

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

Before CLARK, FAY and VANCE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

September 22, 1978

Issued As Mandate: Nov. 16, 1978

Date of Entry : Nov. 20, 1978

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit
by: s/ Brenda Hauck
Deputy

APPENDIX D

ORDER DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76 - 4216

Filed: Nov. 8, 1978

CAROLYN HARRIS THIBODAUX, Individually
and as Administratrix of the Estate of the Minor
children, Etc.

Plaintiff-Appellant

versus

ATLANTIC RICHFIELD COMPANY,

Defendant-Appellee

Appeal from the United States Court for the Eastern
District of Louisiana

ON PETITION FOR REHEARING

(November 8, 1978)

Before CLARK, FAY and VANCE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in

the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

S/ Peter Fay
United States Circuit Judge

Supreme Court, U. S.
FILED
MAY 5 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1231

ATLANTIC RICHFIELD COMPANY,

Petitioner

versus

CAROLYN HARRIS THIBODAUX, ET AL.,

Respondents

RESPONSE ON BEHALF OF CAROLYN HARRIS THIBODAUX, ET AL., RESPONDENTS, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether or not ARCO, as the plaintiffs' decedent's statutory employer, under Louisiana law, may utilize Louisiana law to deprive the plaintiffs of their General Maritime Law remedy for wrongful death under *Moragne*.

2. Whether or not even in the absence of a clear conflict between applicable state and federal laws and policies Louisiana's Workmen's Compensation Statute may constitutionally apply to a death on inland, navigable waters.

AUTHORITIES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1231

ATLANTIC RICHFIELD COMPANY
Petitioner

versus

CAROLYN HARRIS THIBODAUX, ET AL.
Respondents

RESPONSE ON BEHALF OF CAROLYN HARRIS THIBODAUX, ET AL., RESPONDENTS, TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

ISSUES

Initially, respondents point out that the issue stated by petitioner is not the issue stated by the Fifth Circuit Court of Appeals or the basic issue involved in this case, but is instead an inverted statement of those issues in order to present them in what petitioner hopes to be a more favorable light. As stated herein, and by the Fifth Circuit, the issue plainly and simply is whether or not ARCO, at best, a statutory employer as to the plaintiffs' decedent, may utilize Louisiana law to deprive the plaintiffs of their general maritime wrongful death remedy.

As will be shown hereinafter, there can be little question that the *Moragne* wrongful death remedy in inland waters extends to the plaintiffs' decedent. The issue is not whether or not the plaintiffs have such a remedy as the petitioner has framed it, but is whether or not Louisiana State Workmen's Compensation Statutes exclusive remedy provisions, if applicable at all to the facts and circumstances of this case, can be utilized so as to defeat or eliminate that remedy.

Furthermore, the issue as set out by the petitioner has also been overstated in terms of its identification of ARCO as the "employer" of the plaintiff. Van Thibodaux, the plaintiffs' decedent, was employed by H. Buster Hughes, and though the trial court rendered summary judgment finding ARCO to be Mr. Thibodaux's statutory employer under Louisiana law, respondents have vigorously disputed the finding both in the trial court and on the appellate level and contend that even if the statutory employer exclusive remedy provision is applicable, that the issue of whether or not the plaintiff was employed as a matter of fact in the trade, business or occupation of ARCO, as required by Louisiana law in order to establish statutory employer status, is a factual matter to be determined by the finder of fact at the trial of this matter. The Fifth Circuit Court of Appeal did not address itself to this issue because it was not necessary to reach it considering their opinion that the defense was inapplicable as an infringement upon federal maritime remedy.

Finally, neither the petition for writs, nor the Fifth Circuit's opinion directly address the issue of whether or not Louisiana Workmen's Compansation Statute in its entirety may validly and constitutionally be applied to the death of an individual occurring on inland navigable waters. This is, at least, a crucial subissue and must be considered in order to fairly evaluate the primary question presented.

ARGUMENT

I.

Louisiana Workmen's Compensation Statute embodying the statutory employer defense relied upon by the petitioner cannot be constitutionally applied to the facts of this case. The plaintiffs' claims are based on a death by drowning following the sinking of a vessel in inland navigable waters of the State of Louisiana. As early as 1917 in the landmark case, *Southern Pacific v. Jensen,* 224 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, this court held that a New York compensation statute could not be constitutionally applied to an injury sustained on a gangplank between a vessel and a wharf. This was recognized to be a matter beyond the cognizance of any state and exclusively within the federal maritime jurisdiction,

> Since to hold otherwise would impair the harmony and uniformity which the constitutional grant to the federal government of Admiralty Power was meant to insure.

Decades later and subsequent to the rise and fall of the "maritime, but local" and "twilight zone" theories, this court in *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed. 2d 368 (1962), in commenting on *Jensen,* noted:

> While the court acknowledged that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation," the opinion appeared to foreclose the application of a state compensation remedy to any maritime injury.

Since *Calbeck,* the only major development in this field has been the enactment of the 1972 amendments to the Longshoremen and Harborworker's Compensation Act, 33 U.S.C. 901, et seq. This enactment, however, only extended the *Jensen*

and *Calbeck* lines *landward,* and therefore if state compensation remedies could not be constitutionally applied to injuries on navigable waters before these amendments, it can hardly be argued that they can be so applied presently.

An interesting and related development was this court's decision in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320 (1977), which correctly held that the 1972 amendments to the Longshoremen and Harborworker's Compensation Act required maritime employment as a predicate to coverage. In the present case, both the trial court and the Fifth Circuit Court of Appeal agreed with ARCO's contention that Van Thibodaux was not engaged in maritime employment at the time of his death and therefore was not covered by the Longshoremen's and Harborworker's Act or its exclusive remedy provisions.

We, therefore, have a case where no compensation act applies. Congress' failed or refused in 1972 to continue compensation coverage for those non-maritime workers injured on navigable waters and instead limited coverage to those engaged in maritime employment. This cannot be interpreted to allow an unconstitutional application of state compensation acts to accidents occuring within their boundaries on navigable waters. To do so, would be seriously detrimental to the uniformity of treatment to be accorded such persons by the general maritime law in coastal *and* offshore waters. Instead, such persons must be uniformally accorded the fullness of their rights under the general maritime law (including the right to recover for unseaworthiness which was claimed by the plaintiff-respondents in this case but denied by the trial court and the Fifth Circuit in Footnote #16 of its opinion).

II.

Secondly, even in Louisiana's compensation statute can be said to constitutionally apply to the facts and circumstances of this case, it cannot be used to defeat or eliminate the General

Maritime Law wrongful death remedy set up in Moragne v. States Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970). There, it was held that the General Maritime Law included a remedy for wrongful death on inland navigable waters. Florida's wrongful death statute was held inapplicable as being inconsistent with the federal maritime remedy, which included unseaworthiness. Clearly, then the plaintiffs' cause is one of federal admiralty jurisdiction involving a federal right and remedy arising under the General Maritime Law.

Even if we assume for purposes of this argument that ARCO was Van Thibodaux's statutory employer, no federal statute or jurisprudence, including *Moragne,* directly or indirectly limits this cause of action to suits against non-employers. Only the Longshoremen and Harborworker's Compensation Act contains such a restriction and the petitioner and the lower courts are in complete agreement that it is inapplicable to the facts of this case.

Given the existence of the federal right and remedy, can the right be eliminated or defeated by state law? Plaintiff-respondents contend that application of Louisiana's compensation act, even if constitutional, would be in direct conflict with the General Maritime Law, and as such, cannot be applied in this situation. The analogous situations in *Roberts v. City of Plantation,* 558 F.2d 750 (5th Cir., 1977) and *Pope & Talbot, Inc. v. Hann,* 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), cited and relied upon by the Fifth Circuit Court of Appeals, clearly set out the policy and law which must be followed in this case. The fact that neither case involves a so-called "employer" is entirely irrelevant, since there is no authority whatsoever for so limiting the General Maritime Law wrongful death right of recovery and since the Longshoremen and Harborworker's Act with its exclusive remedy provisions has no application in this case.

Admittedly, as the Fifth Circuit and petitioner herein have noted, states are free to supplement established maritime law,

but clearly this cannot be accomplished where there is a direct conflict. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed. 280 (1973), and even *Askew* may not be authority for what petitioner in this case proposes since it dealt with state supplementation of the landward expansion of admiralty jurisdiction by Congress in the 1972 amendment and did not directly address itself to state legislation affecting claims arising upon navigable waters.

Contrary to the groundless assertions and arguments of the petitioner, there is indeed a clear and direct conflict with federal maritime law and policy in this case. Consider, for example, the situation where a non-maritime employee, such Mr. Thibodaux, is drowned by the sinking of a vessel in offshore waters beyond the boundaries of any adjacent state. The decedent's heirs have their remedy under the Death on the High Seas Act, 46 U.S.C. 761, et seq. They are not limited by the exclusive remedy provisions of the Longshoremen and Harborworker's Act and there is nothing in DOHSA or any federal maritime jurisprudence which prevents suit against an employer, statutory or otherwise. Yet, petitioner would have this court differentiate between that man and Mr. Thibodaux simply because Mr. Thibodaux died in state waters and therefore arguably within the constitutional reach of the state. This kind of situation is exactly the kind of direct conflict to which *Moragne* addressed itself. In *Moragne,* Florida's wrongful death statute was held inapplicable because it did not supply an unseaworthiness remedy which was available to the plaintiff under the Death on the High Seas Act. Here, the Death on the High Seas Act has no exclusive remedy provision limiting suit while Louisiana's laws do. Clearly, Louisiana law even if constitutionally applicable cannot be given effect to defeat maritime recovery under *Moragne.* As the *Moragne* court stated, "'no rational policy supports this distinction in the availability of a remedy."

Nor can it be argued that the application of Louisiana law here "poses only a minor threat to the uniformity of maritime

law" as the application of DOHSA's pecuniary loss requirements arguably did in *Mobile Oil Co. v. Higginbotham,* 98 S.Ct. 2010, 56 L.Ed. 2d 581 (1978). Here, we obviously have a direct threat to a federal right and remedy for wrongful death that is not supposed to be dependent upon adjacent state law; *Hornsby v. Fish Meal Co.,* 431 F.2d 865, 5th Cir. 1970. Denial of application of Louisiana law is constitutionally mandated; *Pope, supra.* If Louisiana law can limit the federal maritime law in this case, the potential "parade of horribles" which may be created by the legislation and jurisprudence of coastal states is staggering and must not be allowed to occur.

III.

Finally, and alternatively, should this court hold, for whatever reason, that the plaintiffs' cause of action is limited to suit against non-employers, plaintiff-respondents reurge their right to trial on the factual issues necessary to a finding of statutory employment or borrowed servant status and urge reversal of the trial court's improperly granted summary judgment on that issue or remand to the Fifth Circuit for consideration of this issue, which as pointed out hereinabove, was raised on appeal, but not addressed by the court.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served upon W. K. Christovich, 1815 American Bank Building, New Orleans, Louisiana, 70130, and James C. Murphy, Jr., 1320 First National Bank of Commerce Building, New Orleans, Louisiana, 70112, by placing same in the U.S. Mail, postage prepaid.

Houma, Louisiana, This _____ day of April, 1979.

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JOSEPH L. WAITZ
LAURENCE E. BEST